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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 115

GENERAL MOTORS CORPORATION,
Appellant,
v.
STATE OF WASHINGTON, ET AL.,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

General Motors Corporation appeals from the final judgment of the Supreme Court of the State of Washington, entered on January 7, 1963, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that the questions presented are constitutionally substantial and of public importance.

The Appellees are the State of Washington and the Tax Commissioners of the State of Washington.

OPINIONS BELOW

The opinion of the Superior Court of the State of Washington for Thurston County, in which the case was tried, is not officially reported. A copy of its opinion is attached hereto as Appendix A. The opinion of the Supreme Court of the State of Washington is reported at 160 Wash. Dec. 867, ... Wash. 2d ..., 376 P. 2d 843, and a copy is attached hereto as Appendix B.

JURISDICTION

General Motors brought suit under Section 82.32.180 of the Revised Code of Washington in the Superior Court for the recovery of business and occupation tax (plus interest) paid to the State of Washington and assessed on the entire gross receipts from wholesale sales of motor vehicles and parts manufactured and sold wholly without the state by General Motors and shipped to Chevrolet, Pontiac and Oldsmobile dealers located in Washington, and for an injunction against similar assessments in the future. The Superior Court granted judgment, including the injunction, for General Motors with respect to the tax assessed on the gross receipts from certain sales and denied relief with respect to the balance. On appeal the State Supreme Court reversed the portion of the judgment in favor of General Motors and affirmed the portion adverse, sustaining the tax as originally assessed on all sales.

A Department of the Washington Supreme Court, the highest state court in which a decision could be had, heard oral argument on November 20, 1961, and the Court, on its own motion, ordered a rehearing *en banc* which was held

on October 15, 1962. The Court filed its *en banc* decision on December 6, 1962, entering final judgment on January 7, 1963, a copy of which is annexed as Appendix C.

Notice of appeal to this Court was filed in the State Supreme Court on March 6, 1963. The jurisdiction of the Supreme Court to hear this appeal is conferred by 62 Stat. 929, 28 U.S.C. §1257(2). The following cases sustain such jurisdiction: *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450; *Field Enterprises, Inc. v. State of Washington*, 352 U.S. 806; *Gwin, White & Prince, Inc. v. Henneford, et al.*, 305 U.S. 434; *Dahnke-Walker Milling Company v. Bondurant*, 257 U.S. 282.

QUESTIONS PRESENTED

(1) Is a Washington tax on the privilege of engaging in the business of making sales at wholesale within said state, and which is measured by unapportioned gross receipts, repugnant to the Commerce Clause of the United States Constitution when applied to the entire gross receipts from sales of goods manufactured and sold wholly without the state by a foreign corporation to retail dealers located within the state, when that corporation's in-state business activities with respect to such dealers consist only of checking on the performance by such dealers of their Dealer Selling Agreements with said foreign corporation and assisting such dealers, principally by advice, with respect to their conduct of their retail businesses?

Subsidiary to this question are the following:

(a) Is such a tax a prohibited exaction on the privilege of engaging in interstate commerce when there is no local office in any way related to the trans-

actions upon which the tax is based, there is no separable intrastate commerce, and the only in-state aspects are the locations of the customers (retail dealers), national advertising placed outside the state, and regular contacts with the customers at their places of business by traveling representatives, some of whom reside in the state (hereinafter referred to as transactions of the first class)?

(b) Does the Commerce Clause prohibit such an exposure of the interstate commerce to the risk of multiple burdens and as to some of the transactions to actual double taxation?

(c) Are the answers to (a) and (b) the same for other transactions which are in all respects similar except for the addition of an office in the state staffed by one man (and his secretary) whose duties are to give additional advice to dealers in all of Alaska and parts of Washington and Idaho and to assist them primarily by expediting shipments in periods of short supply (hereinafter referred to as transactions of the second class)?

(2) Is a Washington tax measured by unapportioned gross receipts which is laid on both the privilege of manufacturing and the privilege of selling, but exempts from tax as manufacturers those who pay the tax as sellers, repugnant to the Commerce Clause of the United States Constitution when applied to an out-of-state manufacturer, because it assures only a single tax on a combination of local manufacture and sale while exposing combinations of local manufacture and out-of-state sale and out-of-state manufacture and local sale to multiple burdens and double taxation, thus providing a direct commercial advantage to intrastate business?

(3) Is a Washington tax on the privilege of engaging in the business of making sales at wholesale within said state, and which is measured by unapportioned gross receipts, repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution when applied to the entire gross receipts of a foreign corporation from sale of goods manufactured and sold wholly without the state to retail dealers located within the state when that manufacturer's in-state activities with respect to such dealers consist only of checking on the performance by such dealers of their Dealer Selling Agreements with said foreign corporation and assisting such dealers, principally by advice, with respect to their conduct of their retail businesses?

Subsidiary to this question are the following:

(a) Is such a tax an unwarranted projection of state power beyond its borders and the taking of property without due process of law when it is measured by the unapportioned gross receipts from manufacture and sale conducted wholly without the state, with only those in-state aspects described in Question (1)(a) and, as to some transactions, in Question (1)(c)?

(b) Is such a tax so measured grossly disproportionate to the protection and benefits conferred by the state upon the business when the only in-state aspects to be protected and benefited are those described in Question (1)(a) and, as to some transactions, in Question (1)(c)?

STATUTES AND CONSTITUTIONAL PROVISIONS

The tax here involved is imposed by Title 82, Chapter 82.04, of the Revised Code of Washington. Pertinent portions of Sections 82.04.040, 82.04.060, 82.04.070, 82.04.220, 82.04.240, 82.04.270, 82.04.295, 82.04.440, and 82.04.500 are set forth in Appendix D hereto.

Art. I, §8, cl. 3 of the Constitution of the United States (Commerce Clause) and the Due Process Clause of the Fourteenth Amendment to that Constitution are set forth in Appendix E hereto.

STATEMENT OF THE CASE

This is an appeal by General Motors from the assessment by the State of Washington of tax, purportedly imposed for the privilege of "engaging within this state in the business of making sales at wholesale" measured by the unapportioned gross receipts from the transactions hereinafter described in bare outline for the limited purpose of this Statement.

Appellant, General Motors, is a Delaware corporation qualified to do business within the State of Washington. It owns and operates factories for the manufacture of automobiles, trucks, parts and accessories for sale at wholesale to authorized independent retail dealers, including a number of such dealers located in Washington. No manufacturing or assembly facilities are located in the State of Washington. Each of Appellant's dealers within the State is incorporated or otherwise organized wholly indepen-

dently of Appellant and has no relation to Appellant except as an independent purchaser of Appellant's products.

Appellant conducts much of its business through Divisions, not separately incorporated, which operate substantially independently of one another. Some of these Divisions maintain offices in Washington and pay without dispute the tax on the transactions passing through such offices. This Appeal involves the transactions of only Appellant's Chevrolet, Pontiac, Oldsmobile and General Motors Parts Divisions and the taxability of gross receipts derived from their sales to Chevrolet, Pontiac and Oldsmobile retail dealers located within the state. All products involved in these transactions are manufactured, sold and delivered outside the state and shipped into the state pursuant to orders from the dealers.

The orders are received at and processed through zone offices and a parts warehouse in Portland, Oregon, completed by delivery and shipment of vehicles and parts from factories (sometimes warehouses) located outside Washington, including factories at Oakland and South Gate, California; St. Louis, Missouri; and Lansing and Pontiac, Michigan; and a parts warehouse at Portland, Oregon.

The field sales organizations of the Chevrolet, Pontiac and Oldsmobile Divisions are similar in most respects. Each Division maintains a zone office in Portland, Oregon. The geographical territory of each "Portland zone" includes Washington, Oregon, Alaska, and variously parts of Idaho, Montana and Wyoming. The zone manager appoints dealers in appropriate locations throughout his territory and executes with each a "Dealer Selling Agreement" which defines the obligations of the parties and the terms on which the dealer may purchase vehicles and parts. Thereafter, the zone manager and his assistants

advise the dealer in the management of his dealership and check his compliance with the Dealer Selling Agreement, particularly through the efforts of a "district manager". Some of the district managers live in the state, but they have no offices other than the zone offices in Oregon. No other zone personnel even live in the state.

Orders are sent by the dealer to the zone office in Portland. The orders are accepted (or rejected) at the zone office or at the factory, and if accepted are filled by shipment from the factory by common carrier, f.o.b. the factory. Payment is received at the factory. By reason of the nature of Appellant's business, solicitation of orders is not a necessary or usual step in its sales procedures.

General Motors Parts Division warehouses and sells and ships to dealers parts and accessories for Chevrolet, Pontiac, and Oldsmobile vehicles. It has warehouses at Portland, Oregon and Seattle, Washington, which stock different classes of items. Items carried by the Portland warehouse are ordered by the dealers directly from Portland, without any participation by the Seattle warehouse. The Division has no field personnel visiting dealers. Appellant has voluntarily paid and does not dispute the tax on the transactions of the Seattle warehouse. Tax on gross receipts from sales from the Portland warehouse, not the Seattle warehouse, is contested here.

The Washington courts divided Appellant's transactions into two classes. The first class included all Oldsmobile, Pontiac and General Motors Parts Divisions transactions, and part of the Chevrolet Division transactions, denominated Chevrolet Class "B". The trial court, reversed by the supreme court, held the first class of transactions constitutionally immune from taxation. The second class of transactions, denominated Chevrolet Class "A", was held by the trial court, affirmed by the supreme court, to be taxable.

The description above is applicable to both classes of transactions. No office of Appellant's in the state had any contact of any kind with the transactions in the first class and every step therein on Appellant's part, from receipt and acceptance of an order to delivery of product and receipt of payment was performed at an office, warehouse or factory outside the state. The respective transactions of the Chevrolet, Oldsmobile and Pontiac Divisions are in no way related to one another, and the transactions of the Portland warehouse of the Parts Division are in no way related to its Seattle warehouse.

The second class of transactions, Chevrolet Class "A", consisted of sales through the Chevrolet Portland office to dealers in Washington other than in the nine southern counties of the state. The sole factual difference between this class and the other is that here Chevrolet maintained a so-called "branch office" in Seattle, consisting of one man and his secretary. Its or his function was to assist Chevrolet dealers in Alaska, part of Idaho and all of Washington except the nine southern counties, to give better service on orders and in particular to get faster delivery. This office did not solicit, receive, process, accept or see orders; it did not make franchise or credit approvals; it did not receive payments, make deliveries or keep books. The branch manager had no jurisdiction over and did not establish contact with any other Chevrolet personnel in Washington, and no other personnel reported to, used or worked from this office.

HOW THE FEDERAL QUESTIONS WERE RAISED IN PROCEEDINGS BELOW

The federal questions sought to be reviewed were raised in the Superior Court by the notice of appeal and complaint, prayer for injunction, stipulation, that Court's memorandum opinion, Appellant's proposed findings of fact and conclusions of law and the findings of fact and conclusions of law entered by the Superior Court and were fully argued and briefed before that Court. That Court held that all sales of the first class were in interstate commerce and outside the territorial jurisdiction of the state and that the application of the statute to such sales would be repugnant to the Commerce Clause of, and the Due Process Clause of the Fourteenth Amendment to, the United States Constitution. It held, however, that the presence of the Seattle office and its "direct connection" with sales through the expediting of deliveries removed the constitutional immunity of the second class of sales.

The Superior Court entered judgment accordingly. The State appealed and Appellant cross-appealed to the Washington Supreme Court the respectively adverse portions of this judgment. On appeal the State Supreme Court sustained the tax as originally assessed on all transactions over General Motors' claim that as so applied the statute was invalid because repugnant to the United States Constitution on both interstate commerce and due process grounds.

The federal questions were raised in the State Supreme Court by assignments of error in the briefs filed by General Motors and the State and were fully argued and briefed. The *en banc* opinion (App. B) of that Court shows that the federal questions were raised and decided as necessary grounds for its judgment and that the validity of the tax statute as applied was drawn in question and sustained against a claim of repugnancy to the United States Con-

stitution. The circumstances of this case are within the prerequisites for appeal jurisdiction as defined in *Dahnke-Walker Milling Company v. Bondurant*, 257 U.S. 282. *Field Enterprises, Inc. v. State of Washington*, 352 U.S. 806, and *Gwin, White & Prince, Inc. v. Henneford, et al.*, 305 U.S. 434, were appeals from the same State Court involving the same tax. This Court, accordingly, has jurisdiction on appeal pursuant to 62 Stat. 929; 28 U.S.C. §1257(2).

THE QUESTIONS ARE SUBSTANTIAL AS A MATTER OF CONSTITUTIONAL LAW

First Question

In terms of this problem, there are three types of commerce: *intra*state, *inter*state and *extra*state. There is no doubt that a state may tax, by unapportioned gross receipts, the privilege of engaging in a separable intrastate business, such as the activities of the General Motors Parts Division Seattle warehouse in this case. However, it is settled that the Commerce Clause absolutely prohibits a tax, however measured, upon the privilege of engaging in purely interstate commerce, and it is immaterial that that commerce may be furthered by even substantial in-state activities. *Northwestern States Portland Cement Co. v. Minnesota; Williams v. Stockham Valves & Fittings, Inc.* 358 U.S. 450, 458; *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389; *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602; *Norton Company v. Department of Revenue*, 340 U.S. 534; *Freeman v. Hewit*, 329 U.S. 249; *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434. *A fortiori*, there cannot be a state tax for the privilege of engaging in extrastate commerce.

The Washington Supreme Court does not in terms find any intrastate commerce nor any realistically separable

local business. It sustains the tax upon a lengthy description, unsegregated, of not only General Motors' in-state activities but its out-state activities as well and also activities of its retail dealers, creating the impression of extensive taxable business activity. It is not, however, the number of words taken to describe business activity that gives rise to tax liability. The controlling consideration is the *character of General Motors'* in-state activities. These activities are nothing more than promotional and service efforts by traveling representatives in furtherance of the out-state manufacture, sale and delivery of General Motors' products for shipment across state lines to Washington dealers. The commerce culminating in the taxed transactions is predominantly extrastate except for such shipments and visits to the in-state dealers, which gives that commerce an interstate character. There is no intrastate commerce.

Under these circumstances, the effect of the decision of the Washington Supreme Court is to sustain an unapportioned gross receipts tax imposed directly and solely on the privilege of engaging in interstate commerce or upon extrastate commerce having minimal in-state aspects. The tax is not even claimed to be imposed on any activity of General Motors "realistically separable" from interstate commerce and measured by related interstate sales. This is clear from the opinion below which after a lengthy recital of the facts states (App. B, pp. 13a-14a):

> "General Motors accomplishes wholesale sales of its products to retail dealers within the state. Part of the activities involved in these wholesale sales take place elsewhere; *e.g.*, orders are filled, delivery made, and payment is received outside of the state. Nonetheless, business activities having a relation to wholesale sales are conducted in Washington.

> These activities provide an incident upon which the taxing statute operates."

The conflict with *Nippert v. City of Richmond*, 327 U.S. 416, 423, is clear.

The "incidents" found taxable here are far less substantial than other elements of the sale itself (without reaching back to the underlying manufacturing) which occur elsewhere, as the execution of "Dealer Selling Agreements" and the receipt and processing of orders at the zone offices in Oregon, and the acceptance of orders, receipt of payment and delivery at the factories in California and elsewhere. If the minimal sales elements in Washington are taxable, so are the larger elements in Oregon and again in California. This is the very type of fragmentation of an interstate transaction with exposure to multiple *unapportioned* exactions which the Commerce Clause was designed to prevent.

Second Question

In separate subsections, the statute levies taxes at the same rate on the privilege of manufacturing, RCW 82.04.240, and the privilege of selling at wholesale, RCW 82.04.270. It then exempts from the tax upon manufacturing any person who is taxable as a seller as to the same transactions, RCW 82.04.440. The statute thus insures that any Washington manufacturer who sells to a Washington customer shall pay only one tax; and it seeks to lay the same tax burden upon a Washington manufacturer who makes a sale to an out-state customer and upon an out-state manufacturer who sells to an in-state customer.

The statute presents an appearance of fairness—everyone seems to pay only one tax. The fact is, however, that

everyone pays only one tax *to Washington.* An out-state manufacturer who pays to his state a tax on the privilege of manufacturing is then met by a demand from Washington for a tax upon the privilege of making sales to customers in Washington. This case involves actual double taxation, not borne by a local competing manufacturer, for as to those vehicles manufactured in St. Louis, Missouri and sold to Washington customers, St. Louis levies a tax on the privilege of manufacturing which is indistinguishable from Washington's tax on manufacturing. Both manufacturing taxes have been held valid: *American Manufacturing Company v. City of St. Louis,* 250 U.S. 459 and *Crown Zellerbach Corporation v. Washington,* 45 Wash. 2d 749, 278 P. 2d 305.

This Court has often invalidated local gross receipts taxes upon a showing of risk that the state of the buyer and the state of the seller might, through different taxing techniques, impose upon interstate commerce multiple tax burdens not borne by intrastate commerce. *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458, reaffirmed the unvarying constitutional principle that a state may not discriminate against interstate commerce:

> "Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, *Memphis Steam Laundry v. Stone,* 342 U. S. 389 (1952); *Nippert v. Richmond,* 327 U.S. 416 (1946), or by subjecting interstate commerce to the burden of 'multiple taxation,' *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954); *Adams Mfg. Co. v. Storen,* 304 U.S. 307 (1938)."

Here we have more than a possible, fortuitous multiplication of burdens. We have actual double taxation through a taxing scheme carefully calculated to discriminate against

interstate commerce by providing a direct commercial advantage to local business. Such discrimination is forbidden.

In *Columbia Steel Co. v. Washington*, 30 Wash. 2d 658, 192 P. 2d 976 and *Weyerhaeuser Sales Co. v. Tax Commission, et al.*, 30 Wash. 2d 947, 192 P. 2d 979, the Supreme Court of Washington itself held that an earlier version of this statute was invalid on Commerce Clause grounds because it exempted from the *wholesalers'* tax those persons who have paid the tax as *manufacturers*. We disagree with that Court's holding in *B. F. Goodrich Co. v. Washington*, 38 Wash. 2d 663, 231 P. 2d 325, and in this case, that the Legislature has cured the infirmity by merely reversing the words so as to exempt from the *manufacturers'* tax those persons who have paid the tax as *wholesalers*. "Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." *Nippert v. Richmond*, 327 U.S. 416, 431.

Third Question

The decision below sustains a privilege tax measured by the entire gross receipts of an out-state manufacturer from wholesale sales of goods manufactured and sold out-state but shipped to retail dealers within the state when that manufacturer's in-state business activities related to such dealers consist only of promotional and service efforts by traveling representatives in furtherance of the out-state manufacture, sale and delivery. From the time of receipt and acceptance of an order to consummation by delivery of product and receipt of payment, every step on General Motors' part in each of the classes of transactions in dispute is performed at an office, warehouse or factory outside the state.

The opinion of the Washington Supreme Court lays aside these facts by saying (App. B, p. 17a):

> "Although the mechanical aspects of the wholesale sales of General Motors to retail dealers occur outside of the state, the substance of each transaction occurs in Washington *where the customer is located* and where the demand for the manufactured product exists, in very large degree, as a result of General Motors promotional activities." (Emphasis added.)

The substance of the holding of the Supreme Court of Washington is that an unapportioned tax measured by gross receipts may be exacted for the privilege of having customers in the state, provided only that there are within the state—first, the customer; second, some minimal presence by the taxpayer within the state, including national advertising developed and placed without the state. This is wholly new law, directly conflicting with many holdings of this Court, *Miller Brothers Co. v. Maryland*, 347 U.S. 340; *Norton Company v. Department of Revenue*, 340 U.S. 534; *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327.

If this is to be the law, it should be declared by no less authority than the Supreme Court of the United States. No other state or local taxing jurisdiction has thus far sought to impose taxes upon such a thin basis and on a measure so unrelated to benefits conferred. But if this decision is allowed to stand, we may expect not only a reinterpretation of existing gross receipts tax structures, as in Illinois, Indiana, West Virginia, Los Angeles, New York City, and others, but a flood of new statutes in many states and municipalities throughout the country seeking to take advantage of this windfall of paying for service to the local citizenry by exacting a toll from those who sell to

them, even though such business is done entirely elsewhere and elsewhere amply taxed.

All that has been done here within the jurisdiction is (1) to beam in national advertising placed without the jurisdiction; (2) to watch and advise the retail dealers (customers) in the conduct of their businesses; and (3) to have customers within the jurisdiction. It is this last point on which the Court below founders. It equates the having of customers with an obligation to the state. An obligation for what? The protection and benefits for which the state is entitled to be reimbursed all go to the customers (who pay for them in their own taxes). No protection or benefits are given to General Motors merely by reason of the fact that retail dealers, or in turn their retail customers, resident in the jurisdiction provide a "market" for its products.

It is a violation of due process for a state to tax transactions beyond its borders, or to impose a tax the measure of which does not bear a reasonable fiscal relationship to the protection and benefits conferred by the state on the interstate activities which give rise to the tax. *Hans Rees' Sons, Inc. v. North Carolina,* 283 U.S. 123; *Connecticut General Life Insurance Company v. Johnson,* 303 U.S. 77; *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435.[1]

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[1] Other courts have recognized that due process and equal protection considerations prevent the imposition of unapportioned gross receipts taxes upon activities which are conducted only in part within the taxing jurisdiction. The decision of the Supreme Court of California in *City of Los Angeles v. Helridge Oil Company,* 48 Cal. 2d 320, 309 P. 2d 417, is directly in conflict with the decision of the Washington Supreme Court in this case, and is particularly interesting in that the business there involved was confined entirely to California with no interstate aspects. It holds that, as a matter of due process and equal protection, Los An-

(Continued on next page)

This Court has never held that an unapportioned gross receipts tax could be imposed for the privilege of doing business in a jurisdiction where there was no office participating in the business, and has frequently held to the contrary. *Norton Company v. Department of Revenue*, 340 U.S. 534. No such new principle should be engrafted upon what the bar understands to be one of the guidelines of tax law except by this Court. Until now, a local office, sufficiently substantial to be a "separable local business", has been the *sine qua non* for this type of tax.

The Washington Supreme Court has erred, not only in finding a "taxable incident", but in holding that, there being such an incident, the measure of the tax based upon that incident is constitutionally immaterial. This Court has held to the contrary, notably in *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, involving this very tax. In that case it said, at page 438:

> "While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state. A substantial part of it is outside the state where sales are negotitated and written contracts of sale are executed, and where deliveries

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(Continued from preceding page)

geles may impose its gross receipts tax upon only that portion of receipts arising from selling activities carried on within and without the city as are fairly attributable to the portion of such activities carried on within the city. The Supreme Court of Illinois, which had been reversed in part by this Court in *Norton Company v. Department of Revenue*, 340 U.S. 534, later held in *Automatic Voting Machine Corp. v. Daley*, 409 Ill. 438, 100 N.E.2d 591, that extensive sales promotion activities, the delivery of bids, the passage of title to the goods sold, and the installation and servicing of the machines and the giving of instruction in their operation, all by non-resident employes temporarily in the state, did not constitute the business of making sales in the state.

> and collections are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; *so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume.*" (Emphasis added.)

Although couched in interstate commerce terms, *Gwin, White & Prince* is eloquent in its denunciation of an improper measure in reasoning which is equally appropriate to due process.

THE QUESTIONS ARE SUBSTANTIAL AS A MATTER OF PUBLIC IMPORTANCE

The economic importance of this decision is huge, although only some $320,000 is directly at stake. The contested assessments cover only some of General Motors' Divisions and only relatively brief periods ending in 1953. The accumulated liability for all Divisions for the ten years since that time runs to many hundreds of thousands of dollars. The Attorney General of Washington in a press release estimated that a decision in favor of General Motors would prevent the state from collecting an additional $1,500,000 a year. Having in mind that the decision affects every business which does not have a participating office in the state but which ships to customers located within the state and which has any presence therein, however slight, we consider that estimate low. The indeterminate future is of course even more importantly involved than the past.

Were the novel principle of this decision to be adopted in other jurisdictions, either by interpretation of existing statutes in some states and municipalities, or by new legislation to take advantage of this new way to make outsiders pay for insiders' benefits, other liabilities of inestimable amounts would arise—some of them for past periods long since considered closed and fixed. There will be windfalls to many jurisdictions, as in Washington, never contemplated in the legislation or budgetary planning.

This tax law had been in effect, and General Motors had been paying the tax, for some twenty years before these assessments were made. Throughout that long period no attempt was made to apply the tax to the types of transactions here involved. It was assumed that there was no sufficient nexus to support the tax, that there was no separable local business, and that there were no sufficient protection and benefits conferred to justify an unapportioned gross receipts exaction to pay for them. The state is here seeking not to defend revenue planned by the Legislature but to extend the tax collector's reach into hitherto unexplored territory.

CONCLUSION

The questions presented have not been settled by this Court's *per curiam* affirmance, 352 U.S. 806, of the decision of the Washington Supreme Court in *Field Enterprises, Inc. v. State of Washington*, 47 Wash. 2d 852, 289 P. 2d 1010, that the taxpayer there was properly assessed with this tax. Field Enterprises operated an office in Washington, to which was attached a large corps of salesmen who

solicited and took orders, received down payments, and, together with other personnel of the office, performed other services in Washington. General Motors has somewhat similar arrangements in Washington, although the number of its personnel and its local activities are only a small fraction of what Field Enterprises' were in relation to the measure of tax, and voluntarily has always paid the tax thereon. *Those arrangements and activities have no relation whatever to the activities, transactions and tax involved in this Appeal.*

The transactions involved in this Appeal can be likened only to those held not taxable by this Court in *Norton Company v. Department of Revenue*, 340 U.S. 534, and, with obvious reluctance, by the Supreme Court of Washington in *B. F. Goodrich Co. v. Washington*, 38 Wash. 2d 663, 231 P. 2d 325. In this case, as in the non-taxable *Norton* and *Goodrich* transactions, there is no local office and no separable local business. As this Court has said, a gross receipts tax on the privilege of doing business "by its very nature makes interstate commerce bear more than its fair share". *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 462.

The decision below is not a refinement or logical extension of existing constitutional law. It is a wholly new approach to the protection which the Constitution affords to the national market. It does not tax business activities; it taxes the presence of customers. Such a radical departure from established constitutional principle is of public importance, and we submit should be given plenary consideration by this Court.

This tax, by its very method of measurement, reaches the entire interstate commerce and extrastate business of

manufacturing and selling. Aside from improperly taxing out-state sales, the statute as applied levies a tax not properly apportioned to business done in the state and for this further reason violates due process, *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123.

Under P. L. 86-272 (73 Stat. 555, 15 U.S.C. §381-4) enacted by Congress in 1959, no state may impose a tax on or measured by *apportioned net income* on account of such activities as those of General Motors in this case, absent a local office, etc. *A fortiori*, the principle and policy of that Act frown upon a tax measured by unapportioned gross receipts.

Not only is the decision below clearly erroneous, it has a serious and far reaching effect on the day-to-day operations of multistate businesses. The business community has generally understood since *Norton Company v. Department of Revenue*, 340 U.S. 534, that an interstate seller had to have some local office or store conducting an intrastate business before it could constitutionally become subject to this type of transaction or gross receipts tax. Business and commercial arrangements have been and are entered into on that understanding.

The decision, therefore, has unsettled these relationships and introduced an element of uncertainty into the national market. Interstate commerce transactions, it holds, may be fragmentized and subjected to a privilege tax measured by unapportioned gross receipts in each state through which that commerce moves.

It is submitted that the decision of the Washington Supreme Court extends the taxing power of the State beyond the limitations imposed by the United States Constitution to the detriment of the national market. We believe that

the questions presented by this Appeal are constitutionally substantial, that the State Court's answers are contrary to all precedent and completely novel, and that they are of great public importance and should be decided by this Court after oral argument and briefing on the merits.

Respectfully submitted,

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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THURSTON COUNTY

GENERAL MOTORS CORPORATION, a corporation,
Plaintiff,
v.
THE STATE OF WASHINGTON, ET AL.,
Defendants.
No. 28036.

MEMORANDUM OPINION

The major question is the taxability of automobiles and other merchandise sold in response to orders placed with offices outside of the state and shipped to the buyer from outside of the state. On the authority of *B. F. Goodrich v. State*, 38 Wn. (2d) 663, and *Norton v. Department of Revenue*, 340 U. S. 534, the sales in question are not taxable *except* that those sales made by the Chevrolet Division within the area served by the Seattle branch Zone office and while said office was open are taxable. The Seattle branch was maintained to assist purchasers (dealers) within the area served by the office to get better service on orders and in particular to get faster delivery. Such a service has a direct connection with the making of sales.

The so-called "Dealer Bonus" is in fact a deduction from the total purchase price. The dealer had an absolute right to the specified sum by his contract. It appeared that while

automobiles were sold only for cash that certain parts and accessories were sold to dealers on credit and that at least one purpose of the "bonus" arrangement was to create a fund for the protection of plaintiff on those credit sales. It is a well established principle that the true nature of a transaction controls and not the name a thing is called. The amount of the "bonus" is not a part of the sales price and is not taxable.

The parts return question has three parts, the return of defective parts is clearly not taxable, the return within thirty (30) days is not taxable, the only problem is with the return of parts in one annual shipment. This annual return of parts is in fact a repurchase by plaintiff and such is not to be deducted from the taxable amount.

Judgment may be presented accordingly.

Dated this the 1st day of December, 1960 A. D.

s/ Charles S. Wright, Judge.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GENERAL MOTORS CORPORATION, a corporation,
Respondent-Cross Appellant,
v.
THE STATE OF WASHINGTON and WILLIAM S. SCHUMACHER, CLARK SQUIRE and A. E. HANKINS, as the Tax Commissioners of the State of Washington,
Appellants.

No. 36001
En Banc.

(Filed December 6, 1962)

This action was commenced by respondent cross-appellant, General Motors Corporation, for a refund of certain business and occupation taxes imposed by the State Tax Commission and for injunctive protection against similar assessments in the future.

The taxes involved were measured by gross receipts to General Motors from wholesale sales of automobiles, trucks, parts and accessories to independent retail dealers in the state. Assessments were made pursuant to RCW 82.04. General Motors duly protested the assessments, and hearings were held by the Tax Commission. The hearings resulted in Tax Commission orders concluding that General Motors had conducted business activities within the State

of Washington during the audit periods in question, which are from January 1, 1949, through June 30, 1953, which were sufficiently related to the sales in question to meet the requirements of the due process clause of the federal and state constitutions and the commerce clause of the federal constitution. Accordingly, the tax was imposed. Thereupon, General Motors sought relief in the Superior Court for Thurston County. The Superior Court granted portions of General Motors' prayer for relief and denied the balance. Both parties have appealed.

The amounts of gross receipts from the transactions which are included in the assessment base are not in question. There is no question either as to the rate of the tax, which, during the audit periods herein involved, was three-tenths of one percent (.003%), measured by the taxpayer's gross receipts from its taxable activities (wholesaling). The computation of the tax assessment and the interest involved have been settled by stipulation of the parties. The basic question presented to this court is whether General Motors is liable for the tax assessed.

General Motors is a Delaware Corporation, qualified to do business in Washington. The corporation conducts much of its business through divisions which operate substantially independently of each other. The transactions of only Chevrolet, Pontiac, Oldsmobile, and General Motors Parts Divisions are included in the tax base involved in this action, although other General Motors divisions and subsidiaries are engaged in business within this state.

General Motors owns and operates factories for the manufacture of automobiles, trucks and other merchandise. Sales of these products are made by General Motors to retail dealers in this state pursuant to orders initiated by the dealers. All of the products herein concerned are

manufactured outside of the state and shipped into the state. Activities conducted primarily outside the state include the design, engineering, fabrication, assembly and delivery of products; the procurement of materials, components and supplies; the general, executive, operating, financial and sales management; the receipt, processing, recording, approving, accepting and filling of orders; the billing and receipt of payment, the investigation, approval and execution of customer contracts (dealer franchises); the investigation and extension of credit; the composition and placement of advertising; and others.

During the audit periods here in question, the trial court found that General Motors was engaged in business actiity within the state. This activity involved the sale of automobiles, trucks, parts and accessories to retail dealers, and, also, included the establishment and maintenance of effective dealer representation, partially accomplished by arranging various sales and incentive contests and programs offered and conducted, separately or jointly, with the dealer and other components of the General Motors organization; national and local advertising programs conducted by General Motors through various media; joint programs conducted at the dealer's place of business to assist the dealer in maintaining and developing a prosperous used-car department, including training of dealer's service personnel in the art of reconditioning automobiles utilizing mobile trainers; and on the job training of dealer employees seeking to develop a strong and capable service department so as to increase the quality of service rendered to the retail purchaser of General Motors' products.

In order to provide for the distribution and sale of the manufactured products of Chevrolet, Pontiac, Oldsmobile and General Motors Parts Divisions, General Motors maintains organizations of employees serving each of its major

subdivisions on a national, regional, zone and district level. This case is concerned with General Motors' business activities conducted within the State of Washington by its sales and promotion organizations—specifically, the divisions mentioned above during the audit periods here in question.

At all times during the audit periods, the State of Washington was included within the western region of General Motors' national organization covering eleven western states. Regions are divided up into geographical zones. At all times relevant herein, Washington was part of the Portland zone, which also included the States of Oregon and Idaho, the area that has now become the State of Alaska, and portions of Montana and Wyoming.

Each zone, including the Portland zone, is composed of geographical districts for the Chevrolet, Oldsmobile and Pontiac divisions. Within each district in the State of Washington are located the various retail dealers of General Motors' manufactured products, to whom wholesale sales of the manufactured products are made by General Motors.

The Portland zone organization for each of General Motors' Chevrolet, Pontiac and Oldsmobile divisions includes a staff of field representatives. Each zone organization is similar in all material respects, except that Pontiac and Oldsmobile have a lesser number of dealers than Chevrolet, and a correspondingly lesser number of districts. The operation of the General Motors Parts Division and certain differences between the Chevrolet organization and the others will be described later. Generally, a zone office is comprised of a zone manager and an assistant zone manager, a business management manager, a parts and service manager, an office manager—car distributor, a number of clerical assistants, and service representatives

and managers for each of the zones' districts. We are most concerned with the activities of the district managers, and the functions of other personnel need not be described in detail.

General Motors' field organizations devote the bulk of their efforts to the assistance of General Motors' retail dealers with the view of obtaining maximum conformance to the specifications and conditions required of the dealers pursuant to the "Dealer Selling Agreement," the terms of which will be described later.

General Motors achieves its wholesale sales of the automobiles, trucks, parts and accessories by the development and maintenance of a strong retail dealer representation; and General Motors' zone employees, including district managers, are charged with the responsibility of developing, maintaining, and promoting retail dealer representation, along with the general duties of promoting, developing, and maintaining good will and public esteem for General Motors' products. The trial court found that the activities of the field organization have a direct effect upon the sales and operations of the independent retail dealers.

The district manager's function includes serving as the zone manager's direct contact with the dealer at his place of business, receiving from him his complaints, observing his operations, reporting thereon to the zone office, and passing on to him such advice and counsel as the zone office can make available to strengthen his operation and make it more profitable, including passing on any knowledge gained of competitive products. District managers' contact and relationship with retail dealers is direct, almost entirely inside the State of Washington, and generally at the dealer's place of business. The frequency of contacts depends upon the size of the dealership and the nature and

extent of the problems confronting the dealer and General Motors. The district manager usually resides within his assigned territory. With the exception of certain activities in relation to the Chevrolet Division, district managers have no Washington offices; however, they frequently use their place of residence for business phone calls and receipt of business mail. District managers do not accept or approve credit, receive payment, or make delivery.

The relationship between General Motors and each of its Chevrolet, Pontiac, and Oldsmobile retail dealers is defined by a written contract called a "Dealer Selling Agreement," which is in all material respects uniform for all dealers in the state. The dealer operates a retail store for the sale of automobiles, and sometimes also trucks, supported by the sale of parts and accessories, a repair and servicing operation according to customers' needs, and the marketing of used cars taken in trade. Dealers are individual proprietorships, partnerships, or corporations, having no corporate relationship to General Motors, except that in some instances another division, Motors Holding Division, lends, temporarily, portions of the substantial capital required to initiate or maintain a dealership. The trial court found that the relationship between retailers and General Motors is that of independent purchaser and seller, and it cannot be said that General Motors had a "dealer organization" within its hierarchy.

The dealer's facilities are his own. He provides the tools, supplies, signs, and an inventory of parts and accessories. New and used automobiles are also owned by the dealer, subject, in the case of new automobiles, to financing arrangements with banks or finance companies, which frequently include General Motors Acceptance Corporation, a wholly owned corporate subsidiary of General Motors. The "Dealer Selling Agreement" provides certain restrictions

on the dealers' use of their own facilities and equipment. A dealer is expected to maintain a place of business, a sales room, and a service department satisfactory to General Motors. The dealer may not establish or move a branch sales office or service organization without written consent of General Motors. Every dealer is required to, and does, submit his books, records, and accounts to General Motors, and to maintain a satisfactory uniform accounting system designated by General Motors. Every dealer is required to meet minimum capital requirements as specified and determined by General Motors. Every dealer is required to, and does, maintain and erect uniform or standard product signs and is required to, and does, participate in advertising campaigns conducted nationally and locally by General Motors. Every dealer is required to carry in stock at all times parts and accessories sufficient to provide prompt and satisfactory service to retail purchasers of General Motors products. Dealers uniformly agree to buy such special tools as are developed by General Motors for the servicing of their products.

To each dealer is assigned a "zone of influence," within which he enjoys the distinction of being the only retail outlet of the specific product for which he is dealer. He is also considered responsible for development of General Motors' share of the retail market within his designated area.

The dealer submits quarterly "projections" of his requirements for automobiles, parts and accessories, to his district manager. Thereafter, an order is sent to General Motors' zone office, usually by mail, sometimes by telephone, and infrequently by the district manager, who then mails or delivers the order to the zone office. Orders are accepted or rejected at the zone office or at the factory;

and, if accepted, they are filled by shipment from the factory by common carrier, f.o.b. the factory. If a dealer's orders are less than his "projections," the district manager, occasionally in conjunction with the zone manager, "counsels and advises" the dealer to determine the cause and to assist the dealer in taking corrective action.

The Parts Division of General Motors has the function of warehousing and shipping parts and accessories for Chevrolet cars and trucks and for Pontiac and Oldsmobile automobiles. Sales are made by this division to retail dealers on order. The division has a warehouse at Portland, Oregon; and during most of the period herein involved it also had a warehouse at Seattle. The warehouse at Seattle carried the "heavy volume" items. Less frequently, called-for items were ordered from the warehouse in Portland. Each dealer was furnished with two order forms. On one, he ordered from the Seattle warehouse items stocked there. On the other, he ordered directly from Portland items not carried in Seattle. Business and occupation tax was paid to the state on all shipments from the Seattle warehouse, and these taxes are not contested. Only the taxes measured by the gross proceeds of sales by the Portland warehouse to retail dealers in Washington are in dispute. The trial court found that the transactions of the Portland warehouse of the General Motors Parts Division were in no way related to the transactions of the Seattle warehouse of that division.

All of General Motors' retail dealers for Chevrolet, Pontiac, and Oldsmobile obtained their supply of parts and accessories for resale and servicing of new and used automobiles during the audit period in question from the General Motors Parts Division.

Chevrolet Division's operations with respect to the Counties of Asotin, Clark, Columbia, Cowlitz, Garfield, Klickitat, Skamania, Wahkiakum, and Walla Walla are identical to those of the other divisions generally described above. Sales to retail dealers in these counties have been described by the parties as Chevrolet Class "B" transactions, and we will refer to them by that designation. The operations and sales to retail dealers with respect to the balance of the state, which hereinafter will be referred to as Chevrolet Class "A" transactions, are substantially similar, except that during the relevant periods involved Chevrolet Division maintained a branch office in Seatle. This office was supervised by the Portland zone manager for a time, and later a Seattle zone office was established. General Motors has paid the tax since the establishment of the new zone office, and that tax is not contested. While the Seattle Branch office was under the direction of the Portland office, it performed the function of expediting deliveries and performing limited promotional work. The trial court concluded that the presence of the Seattle office and the service that it performed had a direct connection with Chevrolet Class "A" sales by the Portland zone office; that such sales were within the territorial jurisdiction of the state; and that the tax measured by these transactions was not violative of the due process clause or the commerce clause. Accordingly, the Chevrolet Class "A" transactions were held taxable. This conclusion is a subject of the cross-appeal by General Motors.

In accordance with a contractual arrangement, retail dealers make annual returns of obsolete parts to General Motors and are allowed credits therefor. The trial court concluded that these parts returns were in fact repurchases by General Motors, and that the amounts attributable to these transactions are properly includable in the gross pro-

ceeds of sales of products by General Motors to Chevrolet Class "A" retail dealers. This conclusion is also a subject of the cross-appeal by General Motors.

With respect to all other transactions included within the tax base, the trial court adjudged that General Motors was entitled to recover judgment of refund to the extent of $88,479.44, with interest. General Motors was also granted an injunction against the State of Washington, the Tax Commission, and its members, preventing assessment or collection of any business and occupation tax in connection with transactions past and future, not materially different from the transactions involved in this action.

We will proceed by first analyzing the problems involved with respect to those transactions that are the subject of the Tax Commission's appeal. Some of our discussion will relate incidentally to that portion of the cross-appeal dealing with Chevrolet Class "A" transactions.

We note preliminarily that, in our opinion, like the tail that follows the dog, the tax measured by the gross proceeds of sales by the Portland warehouse of the General Motors Parts Division must stand or fall with the taxes measured by the gross proceeds of the other transactions. Although the General Motors Parts Division does not have a field organization similar to that of the other divisions, the sales of parts and accessories is inseparable from that activity which relates to the development and maintenance of dealer representation and stimulates demand for the automobiles and trucks that parts and accessories accompany. Furthermore, the parties have not segregated their arguments with respect to the activities of the different divisions, so it is safe to assume that the activities of the field organizations of Chevrolet, Pontiac, and Oldsmobile are properly attributable to the corresponding sales by

Chevrolet, Pontiac and Oldsmobile retail dealers of parts and accessories wholesaled by General Motors Parts Division.

The first question presented in this case is whether there is a statutory basis for imposing a tax on General Motors for the activities conducted by it within the state during the relevant period involved.

The trial court found that General Motors was engaged in business in the State of Washington at all times during the audit periods here in question. It also found that General Motors' activities, through its employees, had a direct effect upon the sales and operations of the independent retail dealers. The business and occupations tax statute, RCW 82.04.220, imposes a tax on the privilege of engaging in business activities. General Motors accomplishes wholesale sales of its products to retail dealers within the state. Part of the activities involved in these wholesale sales take place elsewhere; *e. g.*, orders are filled, delivery made, and payment is received outside of the state. Nonetheless, business activities having a relation to wholesale sales are conducted in Washington.[1] These activities provide an inci-

[1] The trial court did not specifically find that the business activities conducted by General Motors were related to the wholesale sales consummated by General Motors to retail dealers, but such a finding is unnecessary in view of other specific findings mentioned above. Since the activities of General Motors had a direct effect on the sales of retail dealers, those activities necessarily had a direct effect on wholesale sales to retail dealers. The extensive field organization work undertaken by General Motors to assist retail dealers in maintaining a desired sales volume is performed because greater retail sales by retail dealers also means geater wholesale sales by General Motors to retail dealers. Significantly, the trial court refused to find that the activities of General Motors were unrelated to wholesale sales of General Motors to retail dealers.

dent upon which the taxing statute operates.[2] Whether or not these activities are sufficiently related to the accomplishment of wholesale sales to base the tax on the gross receipts of all wholesale sales to Washington retail dealers is a question with constitutional law ramifications in relation to the *measurement* of the tax and not the *imposition* of the tax. On the facts indicated, we hold that there is a statutory basis for imposing the tax. We will now proceed to the crucial questions presented; *i. e.*, whether the imposition of the tax measured by the gross receipts of all wholesale sales to Washington retail dealers is violative of the due process clauses of the federal and state constitutions or the commerce clause of the federal constitution.

Does the tax amount to an attempt by the State of Washington to extend its taxing powers beyond its borders? Or, to put it another way, are the gross proceeds included in the measure of the tax sufficiently related to the nexus of local activity conducted by General Motors to be within the state's power to tax?

Much discussion by both parties in voluminous briefs and in oral argument relates to the significance of the presence of absence of a local office as a criterion for de-

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[2] We have examined Rule 193 promulgated by the Tax Commission, which it is contended binds the Tax Commission to an interpretation that transactions such has those involved here are beyond statutory coverage. Rule 193 was intended to be a general guide rather than a final interpretation as to transactions covered by the taxing statutes. The preface to the rule states: "Scope of this Rule: This rule governs all matters relating to interstate and foreign commerce. The diversity of problems involved limits the rule to a statement of general principles and the Tax Commission reserves the right to rule upon each question as it arises." It is our view that the Tax Commission's position in this case is consistent with its interpretation reflected in Rule 193, and further, that the Tax Commission did not irrevocably bind itself to a particular interpretation by virtue of Rule 193.

termining whether the state has power to tax a corporation involved in transactions which permeate state boundaries. We do not think it necessary to discuss in detail all of the authorities cited. It suffices to say that we are not persuaded that any case of the United States Supreme Court or of this court dictates the approach that presence or absence of a local office is *the* controlling factor. To allow tax immunity to those who direct business activities from a point just across the state line, regardless of the quantum and effect of local activity, would amount to a discrimination against those who have located offices within the state. And taxation of those who perform *de minimus* activities through a local office would be unreasonable and unjust.

Although location of an office within the state has been of assistance in characterizing the extent of operations and activities within a state (see *Norton Co. v. Department of Revenue* (1951), 340 U.S. 534, 71 S. Ct. 377, 95 L. Ed. 517; *Field Enterprises, Inc., v. State* (1955), 47 Wn. (2d) 852, 289 P. (2d) 1010, *aff'd per curiam,* 352 U.S. 806 (1956); *B. F. Goodrich Co. v. State,* (1951), 38 Wn. (2d) 663, 231 P. (2d) 325, *cert. denied,* 342 U.S. 876 (1951)), the mere physical presence of an office within the state has never been the sole criterion for validating a state's assessment of a tax. Conversely, absence of a local office does not render the conclusion automatic that sufficient nexus to validate a tax is lacking. The essential inquiry must be directed to the amount and effect of the activities involved and not the form of the operations. See *Brown Foreman Distillers Corp. v. Collector of Revenue,* (1958), 234 La. 651, 101 So. (2d) 70, *cert. denied,* 359 U.S. 28 (1959).

The fact that extensive manufacturing and operational activities of General Motors occur elsewhere has no bearing on the question before this court. The state is not attempting to tax those activities, but rather is seeking to tax business activity in Washington measured by wholesale sales to Washington dealers. Thus, considerations of other activities performed by General Motors are irrelevant to the question of taxable activity in relation to wholesaling transactions. We are considering here only the wholesaling function and the effect of the activities of General Motors in Washington attributable to that function.

Although the facts reveal that General Motors' activities in this state are substantial, no local office is maintained in this state, except for the Class "A" Chevrolet office in Seattle. The activities involved are extensive promotional and service efforts. They pervade virtually every aspect of the retail dealer's operations. The General Motors field organization representatives are intimately associated with the retail dealers on matters pertaining to the dealers accounting and business operational methods; the dealers' sales and service techniques; the dealers' inventory of parts and accessories; the dealers' show-room and service facilities; and the dealers' used-car business. In addition to these tangible and directly-performed activities other activities of a more subtle nature are engaged in within this state and in conjunction with dealers. General Motors' advertising is beamed in via television, exhibited by means of outdoors advertising, and distributed by way of newspapers and magazines. All of these activities are related to sales of General Motors in the sense that they tend to strengthen dealer representation and stimulate consumer demand. Because of the very nature

of the activities, it cannot be said that General Motors directly participates in particular retail sales. Yet the activities undeniably have a very great effect in terms of increasing total retail sales in Washington, thereby increasing also wholesale sales. All of the transactions measured by the tax imposed on these activities are in some degree affected by General Motors' organized promotional efforts.

According to the rule of the *Norton* case, *supra*, reiterated by this court in the *Goodrich* case, *supra*, where extensive business activity occurs within a state, taxation can only be avoided upon a showing that the activities are disassociated from the sales in question. Therefore, it is incumbent upon General Motors to make a showing of disassociation or, at a minimum, some degree of disassociation in order to remove from taxation that portion of sales not attributable to that activity. This has not been done. Although the mechanical aspects of the wholesale sales of General Motors to retail dealers occur outside of the state, the substance of each transaction occurs in Washington where the customer is located and where the demand for the manufactured product exists, in very large degree, as a result of General Motors promotional activities. *Field Enterprises, Inc. v. State, supra; cf: Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. (2d) 421. The activities of General Motors in Washington in relation to these sales provide a sufficient nexus upon which to base the tax. Thus, the state is taxing only that which takes place within its borders, and measuring the tax by transactions which relate sufficiently to the activities in question to be within the requirements of the due process clause.

We turn now to an examination of commerce clause considerations.

The primary considerations for determining the limits of a state's power to tax activities connected with interstate commerce are: (1) Whether the tax places an extra burden on interstate commerce not borne by intrastate commerce, or erects barriers, placing out-of-state businesses at a disadvantage; the discrimination test. (2) Whether the interstate commerce involved is subject to the risk of repeated exactions of the same nature from other states; the multiple burden test. *Washington-Oregon Shippers Co-operative Association v. Schumacher* (1961), 159 Wash. Dec. 171, 367 P. (2d) 112; and cases cited therein.

It is alleged that, by virtue of RCW 82.04.440,[3] Washington businesses engaged in intrastate commerce receive a commercial advantage; or, conversely stated, that discrimination against interstate commerce results. The alleged commercial advantage arises when an out-of-state manufacturer is compelled to pay the Washington wholesale tax and a manufacturing tax in another state, while the local producer pays only the wholesale tax. However, the advantage, if any, does not result from the Washington imposition of a wholesale tax, but rather from the failure of Washington to impose a tax on the manufacuring activities within its jurisdiction. The essence of this contention is that it is necessary for Washington to tax local manufacturers for the privilege of producing to the same extent that their competitors are subjected to taxation by other states. This is of course not only unnecessary, *B. F. Goodrich v. State, supra,* but is also impossible,

[3] RCW 82.04.440 in essence provides that goods manufactured and sold within the state of Washington are only subject to a wholesale tax.

since there is neither a uniform practice of taxation nor tax rates by states in reference to manufacturing activities within their jurisdictions. Furthermore, this contention does not validly attack the imposition of the wholesale tax, since it is based upon an activity separate and distinct from manufacturing.

The tax in question is applicable to all who engage, within the state, in the business of making sales at wholesale. It is only that local activity which is being subjected to taxation. And the tax is imposed equally upon all who participate in the same activity within the state. Those involved in interstate commerce are not forced to bear any burden not borne by those exclusively engaged in intrastate commerce, so it cannot be said that the tax is discriminatory. *Washington-Oregon Shippers, supra; B. F. Goodrich Co. v. State, supra.*

It is also contended that the state's imposition of a tax on the local wholesaling activities of a company which manufactures its products outside the state subjects that company to multiple tax burdens not borne by those companies which both manufacture and wholesale within the state. (This contention is partially based upon RCW 82.04.440, which has been previously discussed.) This contention of multiple-burden taxation was made in *B. F. Goodrich Co. v. State* (1951), 38 Wn. (2d) 663, 668, 231 P. (2d) 325; *cert. den.* 342 U.S. 876, and it was answered as follows:

> "Because some other state might exercise its undoubted right to tax the privilege of manufacture with respect to goods ultimately sold in Washington (*American Mfg. Co. v. St. Louis,* 250 U.S. 459, 63 L. Ed. 1084, 39 S. Ct. 522; see *Freeman v. Hewit,* 329 U.S. 249, 91 L. Ed. 265, 67 S. Ct. 274), this state need

not forego its right to tax the business of selling those goods. Each state must derive its revenues from what goes on within its own borders. And if Washington's statute exempts local manufacturers from paying their tax as manufacturers, providing they also pay it as sellers, that, as appellant admits, can be of no concern to one who manufactures out of the state.

"Appellant engages in but one local taxable activity —selling—and as to this it is now taxed on a parity with all others who engage in like activity here."

We adhere to this position.

The tax is imposed upon business activity within the state. The measure of the tax is the proceeds from the sales attributable to that activity. No part of the tax is attributed to manufacturing or other activities taking place outside of the state. *Crown Zellerbach Corp. v. State*, 53 Wn. (2d) 813, 328 P. (2d) 884; *cert. denied* 359 U.S. 531 (1958); *U. S. Steel Corp. v. State* (1957), 51 Wn. (2d) 224, 316 P. (2d) 1099. The fact that some other incident occurs elsewhere rendering General Motors liable for a different tax in another state does not mean that multiple burdens are occasioned as a result of the Washington tax, because repeated exactions of the same nature do not occur. *B. F. Goodrich Co. v. State, supra.* We hold that the tax in question is not violative of the commerce clause.

The statements heretofore made in relation to the validity of the tax measured by the gross receipts from Chevrolet Class "B" sales and Pontiac, Oldsmobile, and General Motors Parts Divisions sales are for the most part applicable and dispositive of the questions raised by the cross-appeal. Not only are the same extensive promo-

tional and service efforts performed in connection with Chevrolet Class "A" sales to retail dealers, but addditional activities were undertaken by the Seattle branch office to expedite delivery. *A fortiori* taxes, measured by these transactions, were validly assessed.

With respect to the question raised concerning sales and returns of obsolete parts, the following is dispositive. The pertinent contractual provisions relating to the return of parts read as follows:

> "5. A. During the months of August, September or October of each year, * * * Dealer may return to Chevrolet one shipment of new, unused and undamaged Chevrolet (C & CX) parts purchased from Chevrolet, or purchased from an outgoing Chevrolet dealer as part of Dealer's initial Chevrolet parts stock, for a maximum credit value not to exceed four per cent (4%) of Dealer's net purchases of such parts, excluding batteries and electrolyte, during the previous fiscal year beginning July 1 and ending June 30.
>
> "B. The return of such parts shall be subject to the following conditions:
>
> "(1) Only those Chevrolet (C & CX) parts will be eligible for return hereunder which were listed for service in any of the Chevrolet Dealers Parts and Accessories Price Schedules which were in effect during the current and two preceding fiscal years. Chevrolet will credit Dealer's account for such eligible return parts with the Dealer Net Prices therefor in effect at the time such parts are received by Chevrolet. * * *"

General Motors contends that returned parts transactions are rescinded sales rather than repurchases and,

therefore, excludable from the gross proceeds of sales of products by General Motors to Chevrolet Class "A" retail dealers.

It will be observed that contract provisions specify that dealers receive credit for returns in accordance with prices in effect at the time of the return rather than those in effect at the time of the original purchase. Thus, it is evident that the transactions are in fact repurchases and not rescinded sales. Furthermore, General Motors' contention is based upon the assumption that sales of parts are never final until the specific part is no longer returnable. We do not so interpret the contractual provisions. Accordingly, the trial court was, in our opinion, correct in its conclusion that sales of these items were final, and that returned items were repurchased.

The decision of the trial court is hereby reversed with respect to the appeal initiated by the Tax Commission, and affirmed with respect to the cross-appeal initiated by General Motors.

Finley, C. J.

We Concur:

Hill, J.
Donworth, J.
Weaver, J.
Rosellini, J.
Ott, J.
Hunter, J.
Hamilton, J.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GENERAL MOTORS CORPORATION, a Corporation, *Respondent-Cross Appellant*, v. THE STATE OF WASHINGTON and WILLIAM S. SCHUMACHER, CLARK SQUIRE and A. E. HANKINS, as the Tax Commissioners of the State of Washington, *Appellants.*	No. 36001 Thurston County No. 28036

REMITTITUR

(Judgment)

This is to certify that the opinion of the Supreme Court of the State of Washington filed on December 6, 1962, became the final judgment of this court in the above entitled case on January 7, 1963. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows: One Thousand Four Hundred Thirteen and no/100 ($1,413.00) Dollars in favor of appellants and against General Motors Corporation, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 8th day of January, A. D. 1963.

/s/ William M. Lowry,
William M. Lowry
Clerk of the Supreme Court,
State of Washington.

Of record in the Office of the Clerk
of the Supreme Court, Journal 48,
at Page 41.

APPENDIX D

STATUTES
CHAPTER 82.04 OF THE REVISED CODE OF WASHINGTON

82.04.040 *"Sale," "casual or isolated sale."* The word "sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration * * *.

* * * * *

82.04.060 *"Sale at wholesale," "wholesale sale."* The term "sale at wholesale" or "wholesale sale" means any sale of tangible personal property and any sale of or charge made for labor and services rendered in respect to real or personal property, which is not a sale at retail.

* * * * *

82.04.070 *"Gross proceeds of sales."* The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

* * * * *

82.04.220 *Business and occupation tax imposed.* From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against

value of products, gross proceeds of sales, or gross income of the business, as the case may be.

* * * * *

82.04.240 *Tax on manufacturers.* Upon every person except persons taxable under subsection (2) of RCW 82.04.260[1] engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, manufactured, multiplied by the rate of one-quarter of one percent;

The measure of the tax is the value of the products, including by-products, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

* * * * *

82.04.270 *Tax on wholesalers.* Upon every person except persons taxable under subsection (1) of RCW 82.04.260[2] engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one percent.

* * * * *

82.04.295 *Temporary surtax imposed.* From and after the first day of November, 1951, until the thirtieth day of April, 1953,[3] there is levied and shall be collected from every person for the act or privilege of engaging in busi-

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[1] This subsection deals with wheat flour manufacturers.

[2] This subsection deals with wholesalers of grain.

[3] Temporary surtax continuously extended, increased, and made permanent at the rate of seventy-six percent by Laws of 1961, Chap. 293, §2; RCW 82.04.296 (1961).

ness activities, as a part of the tax imposed by this chapter and as a temporary increase thereof, a surtax in the amount of twenty percent of the tax payable under this chapter.

* * * * *

82.04.440 *Persons taxable on multiple activities.* Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in: *Provided,* That persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240, or subsection (2) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold, and that persons taxable under RCW 82.04.240 shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

* * * * *

82.04.500 *Tax part of operating overhead.* It is not the purpose of this title that the taxes herein levied upon persons engaging in business shall be construed as taxes upon the purchasers or customers, but it is the ontention that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons engaging in business.

APPENDIX E

UNITED STATES CONSTITUTION

Art. I, Sec. 8, clause 3:

"The Congress shall have Power—

* * *

"To regulate Commerce . . . among the several States . . ."

Fourteenth Amendment, Sec. 1:

". . . nor shall any State deprive any person of . . . property, without due process of law; . . ."